IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 442

SCHWEGMANN BROTHERS, ET AL,
Petitioners,

versus

CALVERT DISTILLERS CORPORATION,
Respondent,

and

No. 443

SCHWEGMANN BROTHERS, ET AL,
Petitioners,

versus

SEAGRAM-DISTILLERS CORPORATION,
Respondent.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

J. BLANC MONROE,
MONTE M. LEMANN,
WALTER J. SUTHON, JR.,
ROBERT G. POLACK,
Attorneys for Respondents.

HAUSER PRINTING CO., INC., NEW ORLEANS

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CITATIONS

CITATIONS—(Continued)

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May It Please the Court:

BASIS OF DECISION BELOW

The decision below, enforcing resale price maintenance against a non-contracting retailer, is unquestionably fully in accordance with the applicable state law.[1]

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[1] *Pepsodent Co. and International Cellucotton Products Co. v. Krauss Co.*, 200 La. 959, 9 So. 2d 303 (1942); *Mennen Co. and Bristol-Meyers Co. v. Krauss Co.*, 134 F. 2d 348, 5 Cir. (1943).

Apart from the question now raised by petitioners under the Commerce Clause and the Miller-Tydings Amendment, it is settled that state statutory provisions of the character here in question do not violate any provision of the Constitution of the United States.[2]

The opinion sought to be reviewed herein, after referring to these decisions favorable on so many aspects to the validity of state fair trade acts, correctly says:

> "In this state of the law, proponents of, and protagonists for, the fullest scope for state fair trade statutes needed only the passage of a federal act relieving price maintenance contracts from the prohibitions of the Sherman Act. They did not need to seek from Congress permission or authority to enact fair trade statutes. It would have been a complete misconception of the source of state power, indeed in complete derogation of it, to do so. For the power to enact state fair trade laws derives not from the Congress, but from the inherent powers of the states." [3]

Petitioners ask this Court to construe the Miller-Tydings Amendment as creating a divided authority over the legal aspects of resale price maintenance within a state, such as Louisiana, having a typical fair trade act. Their contention is that, in such a locality, contracting resellers are governed by the provisions of the state fair trade act permitting resale price maintenance, while non-contracting resellers are subject to the asserted prohibitions of the Sherman Act in that field.

Upon this theory, two competing retailers in the

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[2] *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936), affirming 363 Ill. 559, 2 N.E. 2d 929, 363 Ill. 610, 2 N.E. 2d 940 (1936); see also the companion decision to the same effect, *The Pep Boys, Manny, Moe & Jack of California, Inc. v. Pyroil Sales Co., Inc.*, 299 U.S. 198 (1936), affirming 5 Cal. 2d 784, 55 Pac. 2d 194, 5 Cal. 2d 446, 55 Pac. 2d 177 (1936).

[3] 184 F. 2d at p. 15; Calvert R. 107; Seagram R. 101.

same neighborhood, functioning otherwise similarly as local outlets for the same goods of interstate origin, would be governed by different and diverse systems of law in the field of resale price maintenance if one had signed a resale price maintenance contract on a particular line of goods and the other had not done so. To attribute to the Miller-Tydings Amendment a result so out-of-balance would be inconsistent with the principle expressed in the following language in *Federal Power Commission v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949):

> "If possible, all sections of the Act must be reconciled so as to produce a symmetrical whole."

LEGISLATIVE HISTORY OF MILLER-TYDINGS AMENDMENT CLEARLY SUPPORTS DECISION BELOW

The decision sought to be reviewed is supported upon legislative history by the prior decision of Judge Borah in *Pepsodent Co. v. Krauss Co.*, 56 F. Supp. 922 (D.C. La., 1944). Petitioners concede[4] that this is the only other reported decision on this particular issue.

While both the majority and dissenting opinions in the present case express a refusal to consider legislative history, upon the view that the provisions of the Miller-Tydings Amendment are clear and unambiguous,[5] Judge Borah utilized a different approach in *Pepsodent Co. v. Krauss Co.* After fully reviewing the legislative history of the Miller-Tydings Amendment,[6] he stated as follows his conclusions as to Congressional intent derived from this source:

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[4] Petition, p. 6.

[5] 184 F. 2d at pp. 15, 16; Calvert R. 107, 109; Seagram R. 101, 103.

[6] 56 F. Supp. at pp. 924-927.

> "The history of the legislation leaves no doubt that Congress enacted the Miller-Tydings amendment with full knowledge of the provisions in state fair trade acts making resale price maintenance effective against non-contracting retailers, and that it was the design and intention of Congress to remove every obstacle which would hinder the free enforcement by the states of the provisions of their local fair trade acts in such fashion as their respective legislatures saw fit." [7]

Old Dearborn Distributing Co. v. Seagram-Distillers Corp.[8] and *The Pep Boys, Manny, Moe & Jack of California, Inc. v. Pyroil Sales Co.*,[9] upholding the constitutionality of the Illinois and California Fair Trade Acts, with especial emphasis upon the provisions for enforcing resale price maintenance against non-contracting resellers, were decided by this Court on December 7, 1936. This was well prior to the initial date (January 7, 1937)[10] in the sequence of significant legislative events in the progress of the Miller-Tydings Amendment towards enactment in August, 1937, as detailed by Judge Borah in his opinion in *Pepsodent Co. v. Krauss Co.* References to these decisions in both Houses of Congress appear in Judge Borah's analysis of this legislative history. Undoubtedly these then recent decisions, dealing primarily with state statutory resale price maintenance enforcement against non-signers, had a large part in the decision of Congress to turn over the subject of statutory resale price maintenance to the states through the enactment of the Miller-Tydings Amendment. We submit upon the following citations that Judge Borah correctly considered and gave weight to these legislative

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[7] 56 F. Supp. at p. 927.
[8] 299 U.S. 183.
[9] 299 U.S. 198.
[10] 56 F. Supp. at p. 924.

history materials in deciding this issue, and that the Court below in the present case could have correctly rested its decision upon that ground also:

United States v. American Trucking Associations, Inc., 310 U.S. 534, 543 (1940).

United States v. Dickerson, 310 U.S. 554, 562 (1940).

Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943).

Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 301 (1943).

CONTENTION OF PETITIONERS WOULD RENDER MILLER-TYDINGS AMENDMENT VIRTUALLY NUGATORY

The emphasis repeatedly placed by petitioners upon the phrase "contracts or agreements" in the Miller-Tydings Amendment, and upon the absence in that enactment of any specific mention of the so-called "non-signer" provision in state fair trade acts,[11] ignores the vital and essential interrelation between Sections 1 and 2 of the typical state fair trade act. The two provisions complement each other, and the statutory action for unfair competition under Section 2 against a price-cutting non-contracting retailer assures the contracting retailer that he will be protected against such unfair and destructive competition on the part of non-signers.

This vital interrelation between Sections 1 and 2 of the typical fair trade act was inferentially conceded by opposing counsel themselves, when they said in their

[11] Section 2.

brief in the Court of Appeals for the Fifth Circuit (p. 6):

> "It should be pointed out that a decision favorable to appellants will cripple, if it will not kill the Miller-Tydings Act. If the Miller-Tydings Act is limited, as the act itself says, to validating fair trade contracts but has no application to price-fixing imposed upon non-contracting parties, fair trade statutes will be deprived of effectiveness in transactions affecting interstate commerce."

The protective character of the action for unfair competition against the non-signer under Section 2, complementing the resale price maintenance contracts authorized by Section 1, was recognized by this Court in *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.* in the following language:

> "It is first to be observed that §2 reaches not the **mere** advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wifully* and *knowingly*. We are not called upon to determine the case of one who has made his purchase in ignorance of the contractual restriction upon the selling price, but of a purchaser who has had definite information respecting such contractual restriction and who, with such knowledge, nevertheless proceeds wilfully to resell in disregard of it."
>
> * * * * *
>
> "Appellants [12] here acquired the commodity in question with full knowledge of the then-existing restriction in respect of price which the producer and wholesale dealer had imposed, and, of course, with presumptive if not actual knowledge of the law which authorized the restriction. Appellants were not obliged to buy; and their voluntary

[12] Non-contracting retailers.

> acquisition of the property with such knowledge carried with it, upon every principle of fair dealing, assent to the protective restriction, with consequent liability under §2 of the law by which such acquisition was conditioned." [13]

The holding in the case just cited and quoted, that resale price maintenance under state fair trade acts is legally effective against non-signers, was thereafter repeatedly mentioned in the course of consideration by Congress of the legislation which became the Miller-Tydings Amendment; see the analysis of this legislative history material by Judge Borah in *Pepsodent Co. v. Krauss Co.*[14]

PARKER v. BROWN SUPPORTS DECISION BELOW

Parker v. Brown, 317 U.S. 341 (1943), cited in the brief of the Solicitor General,[15] in principle supports the decision now sought to be reviewed. This Court there held that the marketing program enforced by the California Agricultural Prorate Act did not clash with the prohibitions of the Sherman Act. We quote as follows from the opinion on that point:

> "True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*, 193 U.S. 197, 332, 344-47; and we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States*, 313 U.S. 450. Here the state command to the Commission and to the

[13] 299 U.S. at pp. 193-194.
[14] 56 F. Supp. at pp. 925 and 926.
[15] p. 3.

program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare *Currin v. Wallace*, 306 U.S. 1, 16; *Hampton & Co. v. United States*, 276 U.S. 304, 407; *Wickard v. Filburn*, ante, p. 111.

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen v. Smith*, 195 U.S. 332, 344-45; cf. *Lowenstein v. Evans*, 69 F. 908, 910." [16]

Similarly here, the State of Louisiana determined legislatively that, as a matter of its public policy, resale price maintenance contracts or agreements concerning trade-marked commodities should be legalized and that,

[16] 317 U.S. at pp. 351-352.

when some such commodity has been made the subject of such contracts, intentional price-cutting by a non-signer is an evil which should be prohibited. In *Parker v. Brown*, the prorate program was initiated by and had to be approved by the producers before it became effective, just as in the present case the producer of a trade-marked commodity must enter into resale price maintenance contracts before the state policy against non-signers, as expressed in its fair trade act, becomes effective. Just as in *Parker v. Brown*, it was the state which enforced the prorate program with penal and civil sanctions, so here it is the state acting through its judiciary which enforces the state's public policy as expressed in its fair trade act. No more private action and no less state action is involved here than was involved in *Parker v. Brown*.

In *North Little Rock Transportation Co. v. Casualty Reciprocal Exchange*, 85 F. Supp 961 (D.C. Ark., 1949), the court held that the fixing of insurance rates by a Bureau of insurers, functioning under state statutory authority, did not violate the Sherman Act. We quote from that opinion as follows (p. 964):

> "The Sherman Act is not violated by acts authorized and regulated by state statute. *Parker, Director of Agriculture, et al v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315. There the court said: 'We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.' 317 U.S. at page 350, 351, 63 S. Ct. at page 313."

That case was affirmed on appeal under the same title in 181 F. 2d 175, 8 Cir. (1950), and the denial of

certiorari therein on Oct. 9, 1950, (No. 178 Oct. Term, 1950) is reported in 71 S. Ct. 56.

SHERMAN ACT EXPRESSLY AMENDED BY MILLER-TYDINGS AMENDMENT

The brief of the Solicitor General cites two decisions against restriction or limitation of the Sherman Act by implication from subsequent federal legislation. Neither of these decisions is at all apposite here. Both were cases in which the implication was sought to be drawn from subsequent independent legislation not in terms purporting to amend the Sherman Act.[17] The Miller-Tydings Amendment expressly amended Section 1 of the Sherman Act. The only purpose in amending the Sherman Act could have been to make some change therein. The legislative history of this amendment, as analyzed by Judge Borah,[18] clearly shows an intent to turn over to the state legislatures the handling of the whole problem of resale price maintenance on trade-marked commodities.

CONCLUSION

We urge, as grounds for denial of the certiorari application, the clear correctness of this decision, both (a) for the reasons stated in the majority opinion in the Court of Appeals for the Fifth Circuit herein and

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[17] In *United States v. Borden Co.*, 308 U.S. 188, 198-199, 203-206 (1939), it was argued unsuccessfully that the Agricultural Market Agreement Act of 1937 and the Copper-Volstead Act had impliedly repealed or restricted certain provisions of the Sherman Act. In *U. S. Alkali Export Association v. United States*, 325 U.S. 196, 206-211 (1945), it was unsuccessfully argued that the Webb-Pomerene Act had that effect.

[18] 56 F. Supp. at pp. 924-927.

(b) upon the legislative history analysis relied upon by Judge Borah in *Pepsodent Co. v. Krauss Co.*

Respectfully submitted,

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